

1
2 Mr. D. Lawrence Wobbrock, Attorney at Law
Mr. Charles S. Tauman, Attorney at Law
3 Mr. Richard A. Lane, Attorney at Law,
Appearing on behalf of the Plaintiff;
4
Mr. James L. Dumas, Attorney at Law,
5 Mr. John W. Phillips, Attorney at Law,
Appearing on behalf of the Defendant
6 Philip Morris, Incorporated and Defendant
Roths I.G.A. Foodliner, Incorporated;
7
8 ALSO PRESENT:
9 Mr. Herbert Pallant.

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	WITNESS:	DIRECT:	CROSS:
DR. WILLIAM FARONE	3	

FEBRUARY 19, 2002; 3:20 P.M.

WILLIAM FARONE,

was thereupon called as a witness on behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

THE COURT: No further battles? Bring the jury and let's proceed, please.

(Jury in.)

THE COURT: May I see counsel up here, please, just briefly?

(Whereupon, a conference was held at the bench, off the record.)

THE COURT: All right. Counsel, you may proceed, please.

MR. WOBBROCK: Thank you, Your Honor.

BY MR. WOBBROCK:

Q So we were talking about whole product in vivo, meaning upon animal testing; is that correct, Dr. Farone?

A That's correct.

Q "In vivo" meaning upon a lab animal or a

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1 person or something like that?

2 A Correct.

3 Q As opposed to a petri dish or on an
4 magnifying slide or something like that?

5 A A whole animal system as opposed to
6 cell-level system.

7 Q "In vitro" meaning at the cell level?

8 A Right.

9 Q Referring to this document we have here up
10 on the screen, and having reviewed these documents,
11 and these kinds of documents while you were at
12 Philip Morris, did you get an understanding from
13 this document as to what part of that process had
14 gone on prior to your arrival there?

15 A Well, this document shows that various
16 cigarettes have been made. There is A, B, C, and
17 there is four in each group. You can see three of
18 those cigarettes have been identified. The one at
19 the bottom is Marlboro. The other two are
20 competitive products Lark and Tareyton.

21 The way you would do a competitive
22 product is you actually put it through the machine
23 again, and you put a little piece of paper over
24 where the name is so the person doing the testing
25 can't tell what product it is. So in this, besides

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1 the other experimental cigarettes, you can see it's
2 intended to be a comparison of Marlboro or Lark
3 versus Tareyton. These are actually as marketed
4 consumer products.

5 Q Okay. This is Exhibit 2002. What is the
6 significance of this? Why should this exhibit be
7 important to the jury? How does it relate to your
8 prior testimony?

9 A It relates to my prior testimony, and this
10 explains how the coding was done for the cigarette
11 products that were made. And it also -- this was
12 about twelve years prior to my coming to Philip
13 Morris. By the time I got there, you would no
14 longer see those names put after the code numbers
15 unless they were put there by hand by somebody who
16 knew what they were.

17 And so when you -- without that, when
18 you look at the results, you really don't have much
19 information on exactly what that product was. So if
20 one was interested in, for example, a test of Merit
21 versus Marlboro or Merit versus Benson & Hedges, you
22 wouldn't really know unless you had an awful lot of
23 information what was being tested. So you could
24 find reports that had those code numbers in them --
25 not those, but whatever code numbers they made up

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1 for the last test -- but you wouldn't have much
2 information as to whether or not that was a Marlboro
3 versus Merit test.

4 Q And did you have conversations with
5 Dr. Osdene and others about why they weren't doing
6 that kind of testing so you could get that
7 information, or at least doing it in a way so you
8 could get the information?

9 A Well, the conversation was that it was
10 more about how it was done rather than how it wasn't
11 done. In other words, Dr. Osdene, Dr. Charles,
12 Mr. Carpenter, later Dr. Pages, there was a group of
13 people who were involved in making up the test
14 cigarettes, getting them made, who would then code
15 them and then send them out for testing. Then
16 Dr. Osdene would get the results.

17 So it just -- the only way someone
18 who wasn't in that group could get the information
19 was by going to Dr. Osdene, and then he would tell
20 you whether or not product A was better or less than
21 product B. It makes it very difficult to this day.
22 For example, there is thousands of documents
23 available that have code numbers on them, but
24 without those designations what the products are,
25 you can't tell what test they did or what was better

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1 or worse than something else.

2 Q How free with the information was
3 Dr. Osdene with you?

4 A Not very free at all.

5 Q And the kind of testing that you
6 understood that was being done was comparing what
7 attributes or what aspects of the different products
8 with one another?

9 A Well, there is a series of biological
10 tests, in vivo tests, you can run as there are in
11 vitro tests. You can do, for example, mouse skin
12 painting. You can do inhalation tests. You can do
13 feeding studies; small amount of smoke does get down
14 inside the animals. You can do irritation tests.
15 And with regard to certain kinds of cancer tests,
16 there were actually reports that show you what they
17 call tumorigenic probability. That is the
18 probability on a scale of zero to a hundred percent
19 that the things that they were measuring would cause
20 tumors, tumorigenic probability.

21 And clearly in the testing that we
22 saw, we are able to see -- you can see that there
23 were significant differences between products. You
24 could see that product X was better than Y, and Z
25 was in the middle. You could see rankings, and they

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1 were scientifically, statistically significant. So
2 they weren't that all products were the same. Some
3 are better than others.

4 And in some of the tests, like the
5 one we saw earlier in the report on ammonia, they
6 would clearly break out the statistically
7 significant differences. But those tests where you
8 saw that, were only things like Burley versus Bright
9 versus R.L., never the whole product.

10 When you have to put it all together,
11 what you want to know is what the whole product is.
12 So what you would like to know is, was Marlboro
13 safer in some regard than Lark and Tareyton?
14 Because if it was safer or even if it wasn't safer,
15 you would learn how to make changes in that product
16 to make the product safer.

17 Q So when you did have these rankings of
18 products, it would just have these codes, or would
19 it have names?

20 A Just codes.

21 Q Now so we close the loop here, that kind
22 of studying with the codes, was it done in Europe?

23 A Yes.

24 Q Again, closing the loop a little further,
25 why was it kept secret? Why didn't Dr. Osden want

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1 to share that information with you and others?

2 A Because the information was not to be
3 available to people in the United States, at the
4 facility in the United States, because it would be,
5 as we say, discoverable.

6 Q Discoverable? Found out in a potential
7 lawsuit?

8 A That's correct.

9 Q Now, this procedure about information back
10 and forth to Europe and the INBIFO lab, are you
11 familiar with generally how that would operate?

12 A Yes.

13 Q Okay. And Exhibit 168 of March 31st,
14 1977, to Dr. Max Hausermann from Robert Seligman,
15 are you familiar with this document?

16 A Yes, I am.

17 Q Let me read it and ask you to explain a
18 little bit about it. "I received a copy of Gaisch's
19 March 24, 1977, letter to Jerry Osmalov concerning
20 pesticide residue analysis."

21 First of all, who is Helmut Gaisch?

22 A If you look at the letter, it's addressed
23 to Dr. Max Hausermann. He became my superior later.
24 At the time he was vice-president of research and
25 development at Philip Morris Europe. And Helmut

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1 Gaisch was the director of research there. In other
2 words, he held the position in Europe that was
3 similar to the position that Dr. Osdene held here in
4 the United States.

5 Jerry Osmalov was the manager of the
6 Division that actually made the test cigarettes, the
7 ones that were put the code on (sic). So Jerry
8 Osmalov was the manager of the area that included
9 the semiworks, where they would use the
10 cigarette-making machines to make the cigarette
11 products that would be tested.

12 Q Okay. So Helmut Gaisch sent a copy of a
13 letter to Jerry Osmalov, and Robert Seligman found
14 out about it?

15 A That's correct.

16 Q Okay. Let's see what he says. "As you
17 were copied, you know that Helmut was requesting
18 that we send samples directly to INBIFO. This
19 suggested procedure is in direct conflict with our
20 communications from the New York Office. We have
21 gone to great pains to eliminate any written contact
22 with INBIFO, and I would like to maintain this
23 structure."

24 What is that all referring to then?

25 A It's referring to that he did not want Dr.

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1 Gaisch to have direct communication with anyone at
2 R&D about samples.

3 Q "Therefore, I'm advising Jerry Osmalov to
4 continue sending samples to Nouchatel." Where is
5 Nouchatel?

6 A Nouchatel is in Switzerland. That is
7 where the Research and Development Division for
8 Philip Morris Europe -- where Dr. Hausermann was the
9 Vice-President of Research and Development -- that's
10 where that is located.

11 Q "For transshipment to INBIFO." So send it
12 to Nouchatel, and Nouchatel would do what?

13 A Nouchatel would repackage it and send it
14 to INBIFO.

15 Q "If this procedure is unacceptable to you,
16 perhaps we should consider a dummy mailing address
17 in Koln" -- is that the same as Cologne, Germany in
18 English?

19 A That's the German spelling of Cologne.

20 Q "For the receipt of samples." What is a
21 dummy mailing address in Cologne?

22 A Well, you would just like use Mailboxes,
23 Et Cetera, something like that. It's a post office
24 box or an address that you could send packages that
25 then could be picked up and sent somewhere else.

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1 Q "The written analytical data will still
2 have to be routed through FTR." What is FTR?

3 A French for Federique' Tobacco Research.
4 That is the Swiss subsidiary, one of the names of
5 this location for Research and Development where
6 Dr. Hausermann was Vice-President of Research and
7 Development.

8 Q So FTR is the same as Nouchatel?

9 A Yes.

10 Q "The written analytical data will still
11 have to be routed through FTR if we are to avoid
12 direct contact with INBIFO and Philip Morris U.S.A.
13 I'll leave it to you to decide which route you will
14 follow."

15 "In any event, I would suggest that
16 you retrieve the March 24th letter Helmut Gaisch
17 sent to Jerry, including all copies. My copy is
18 returned herewith. I look forward to your
19 comments."

20 Was this therefore a strict procedure
21 they wanted followed?

22 A Very much so.

23 Q And were you ever part of that procedure?

24 A No. I only was part of the procedure in
25 terms of requesting that certain tests be done.

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1 Dr. Osdene was then responsible for carrying out
2 those tests.

3 Q Now, you testified earlier that you and
4 Dr. Osdene would occasionally go to dinner together?

5 A Quite often, yes.

6 Q And you would meet once a week with other
7 heads of the directorates?

8 A Approximately. We would have a meeting
9 usually on Friday after -- every Friday there was a
10 presentation of a different research product in the
11 Research and Development Division. Frequently
12 either before or after that we would have a
13 director's meeting where Dr. Seligman would -- not
14 every week, but quite often -- would direct the
15 meeting. We would discuss general policy issues for
16 the entire R&D Center.

17 Q Would you get written communications in
18 handwriting from Dr. Osdene on occasion?

19 A Oh, yes, many times, notes and comments
20 written on manuscript. We both were involved in
21 reviewing the manuscripts that were sent out, that
22 kind of thing.

23 Q Familiar with his handwriting?

24 A Yes, I am.

25 Q Where was he from? Where was he raised?

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1 A He was raised in Great Britain.

2 Q Did he have a particular way of referring
3 to himself that was a little bit different than we
4 in the United States do?

5 A Yes. He referred to himself in the third
6 person. He would frequently say T.S.O. did that.
7 Thomas S. Osdene. "T.S.O. decided to do this."
8 T.S.O. -- if you ever met people from Great Britain,
9 frequently they do that. It isn't necessarily an
10 ego thing, but they refer to themselves in the third
11 person.

12 Q Are you familiar with what has been marked
13 as Plaintiff's Exhibit 280?

14 A Yes, I am.

15 Q And let me ask you what this talks --
16 first of all, is this Dr. Osdene's handwriting?

17 A Yes it is.

18 Q Number one, "Ship all documents to Cologne
19 by tomorrow." Meaning Dr. Osdene?

20 A Uhm --

21 Q Is that Tom?

22 A That was Tom. That's the only one I know
23 of, yes.

24 Q "Keep in Cologne --

25 A Yes.

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1 Q -- number 2.

2 "Three, okay to phone and Telex.

3 These will be destroyed."

4 A Telexes would be destroyed, yes.

5 Q "Four, please make available file for
6 something cabinet. Jim will put into, I think,
7 shape something of August" -- I can't read the rest
8 of it. I'm sorry.

9 A Well, it's Jim Charles he's referring to.
10 Jim was one of the people that -- Dr. Jim Charles,
11 Mr. Robert Carpenter, Dr. Robert Pages were -- I
12 think Dr. Robert Ferguson -- there was a group of
13 people who Dr. Osdene entrusted with the
14 information.

15 Q Let's go right down to here where the --
16 Number 6. "If important letters or documents have
17 to be sent, please send to home. I will act on them
18 and destroy." Is that Dr. Osdene's handwriting?

19 A That is Dr. Osdene's handwriting, and that
20 is what he told me was the procedure by which you
21 would find out -- he would get the information. I
22 would talk to him about it, and he would let me know
23 what the results were of the testing.

24 Q Now, reflecting back on your experiences
25 at Lever Brothers, did you do whole-product testing

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1 there?

2 A Yes.

3 Q Did you engage in dummy drops in European
4 laboratories so no one would find a trail of
5 documents that could ever be used in a courtroom
6 like this?

7 A No.

8 Q Is that considered a reasonable way for a
9 corporation to behave, based upon your experience
10 and training?

11 A No.

12 Q Is it consistent with Philip Morris'
13 product -- promise to put people's health paramount
14 above all other considerations?

15 A Not in my opinion.

16 Q And are you familiar with that promise
17 made in what's called the Frank Statement?

18 A I am.

19 Q All right, sir. Let's go back and talk a
20 little bit more about your work at Philip Morris
21 working on a safe cigarette.

22 Did you come up with some ideas and
23 plans and chemical engineering and applied -- I
24 guess it's called applied chemical engineering
25 concepts to come up with a safer cigarette in

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1 several different areas?

2 A Uhm, I -- I supervised a lot of work --
3 about eighty percent of my time there was spent
4 working on issues of trying to remove chemicals from
5 tobacco smoke that we knew to be toxic one way or
6 another. So that was the main focus of the research
7 that we did.

8 Q Let's talk about something known as the
9 N.O.D., N.O.D. effort, or N.O.D. Project. Could you
10 tell the jury what that was?

11 A That was one of many projects that we had.
12 It's an interesting one. There is two versions of
13 N.O.D. To not confuse the jury, I'll use N.O.D.-1
14 and N.O.D.-2. We saw earlier a video of the RL
15 plant. And I mentioned that if they hadn't put that
16 preservative in there, biological changes would take
17 place in those tanks that you saw.

18 One of the problems with that process
19 or one of the problems with growing Burley tobacco
20 is that farmers use too much fertilizer, too much
21 nitrate fertilizer. What happens is the nitrate
22 ends up in the tobacco. When you burn that tobacco,
23 the nitrate turns into oxides of nitrogen. Oxides
24 of nitrogen are not only toxic in their own right,
25 but they react with nicotine to make a compound

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1 which I'm going to called it just N.N.K. I won't
2 give you the name of it. N.N.K. is what is known as
3 a tobacco-specific nitrosamine. It's one of the
4 most toxic chemicals, carcinogens in tobacco. It
5 was on the head of everybody's list, Dr. Osdene's
6 and mine, of chemicals that we should try and take
7 out of tobacco smoke.

8 So one idea for removing it -- we
9 were already removing about ninety percent of the
10 nitrate by simply cooling down that liquid. If you
11 cool it down, the nitrate will precipitate out --
12 you can centrifuge. We used a device that will
13 swivel around, the nitrate will fall to the bottom
14 and you can take off the liquid.

15 It turned out even with ninety
16 percent being removed, we knew there was enough
17 material left to significantly cause responses in
18 these in vitro tests, at least.

19 I was lead to believe by Dr. Osdene,
20 and in vivo testing that was done in vitro also. So
21 we wanted to remove the other ten percent. This is
22 a case where you needed to remove 99.9999 percent of
23 that at having a chance to make a safer cigarette.

24 Q Can I interrupt you? You have got a
25 hundred thousand bullets -- your previous analogy.

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1 I'm standing this far away (indicating), and if you
2 get it down to ten thousand bullets, you still have
3 a good chance of hitting me. Is that what we're
4 talking about?

5 A That's correct. It's even worse here.
6 We're not talking about all the bullets. We're
7 talking about removing a hundred percent maybe of a
8 hundred of 1,000 bullets. You have still got lots of
9 other bullets. But at least this was a case where
10 we thought we could remove all of the nitrate, take
11 out at least the amount countable. It wouldn't have
12 made a safe cigarette. But in the testing we had,
13 it looked like a high probability of making a safer
14 cigarette. It's a step along the way.

15 So we noticed that this was happening
16 by itself naturally, and that's why it was called
17 the naturally occurring denitrification process.

18 Q N.O.D, naturally occurring
19 denitrification?

20 A That's right. So we tried to engineer it
21 in a minimal manner, without too much engineering,
22 to make it as close to the same as what was
23 happening there as possible. And we filed patent
24 application on it. We made product from it. It was
25 sent out to consumer testing, was found to be

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1 acceptable in consumer testing. And Philip Morris
2 commissioned an engineering study -- a woman that
3 they hired to determine whether or not this project
4 was acceptable.

5 Not only that, that was only one of
6 four projects. There were three other projects with
7 the same name. One of them was another bacterial
8 process that was developed in Europe. There was an
9 electrophoresis project where they were trying to
10 remove it by putting electrical fields, and there
11 was a reverse osmosis process. This was considered
12 to be a significant problem. And four different
13 processes were developed that would have be used to
14 do that.

15 The process that we were involved in
16 was one of those four, naturally occurring
17 denitrification. It appeared any one of those four
18 processes could be used. The one that we developed
19 was considered to be the one that might have been
20 easiest to implement. But it also, as the study in
21 1980 showed, would have cost something on the order
22 of a hundred million dollars to implement.

23 Q Were these processes that you are aware
24 of, any of them, ever implemented?

25 A None. Four was never implemented.

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1 Q Do you understand why?

2 A I think I do, yes. They cost --

3 MR. DUMAS: Objection, Your Honor. The
4 witness needs to lay an appropriate foundation.
5 If he's speculating, that is inappropriate.

6 THE COURT: Counsel, rephrase it.

7 BY MR. WOBBROCK:

8 Q Can you tell the jury why these processes
9 were not implemented, without having to speculate?

10 A Yes.

11 Q Okay.

12 A The report that I mentioned earlier states
13 that these processes were acceptable, and it tells
14 you the cost of the projects. And the cost of the
15 projects was a defining problem. A hundred million
16 dollars was considered too much to spend for such a
17 process.

18 Q They have spent hundreds of million
19 dollars on other ideas like a denicotinized
20 cigarette?

21 A That was subsequent to that. Yes, they
22 have. And they spent hundreds of millions of
23 dollars on other things along the way, too, yes.

24 Q So why was this one thought not to be a
25 candidate for implementation?

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1 A Uhm, the -- this particular process would
2 cost a hundred million dollars. It would not result
3 in a new product. It would not result in additional
4 sales. It wouldn't make them any money. It's just
5 something that you would do because you feel that's
6 the right thing to do.

7 Q Was there also a study at Philip Morris
8 when you were there -- well, about another problem
9 called polonium?

10 A Yes.

11 Q What is polonium, and how does it relate
12 to cigarettes and what was done with that?

13 A It's an interesting story. The polonium
14 is a particular isotope, radioactive isotope of
15 polonium called polonium 210.

16 Q Can you spell polonium for the jury?

17 A P-o-l-o-n-i-u-m. It's one of the 92
18 elements that you find as being, quote, natural
19 rather than synthetic or man-made elements.

20 Q On the periodic table of elements we had
21 in high school?

22 A Right. And it's -- it's related to lead
23 210. Lead is another chemical, element on that
24 list.

25 And the transition between those two

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1 gives off radioactivity. And it appears that, if
2 you look at the causes, potential problems that can
3 occur, the idea of having a radioactive isotope of
4 something trapped in your lung that is going to give
5 off a particle is not a good thing.

6 Now, you might want to mention that
7 it was considered to be a low-percentage problem.
8 For example, something less than ten percent of
9 the -- we came to the conclusion, Philip Morris,
10 something less than ten percent of the disease might
11 be caused by organic compounds, and maybe only ten
12 percent of that was due to polonium -- so only one
13 percent of the problem. However, it was something
14 that was very easy to take care of, because all you
15 had to do was measure the tobacco and make sure that
16 the radioactivity of what you were using was not any
17 higher than the background levels of radioactivity
18 like was in this room. So you would be convinced
19 that you weren't exposing people to elevated levels
20 of radioactivity.

21 Q And what happened to that project?

22 A Well, we actually built a facility around
23 1981, '82. It was commissioned, put in service, and
24 the measurements were being made. And at the time I
25 left, they were still being made. The facility was

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1 terminated somewhere in about 1986.

2 Q Do you know why?

3 A Yes, I do.

4 Q Please tell the jury.

5 A Because it was producing evidence that
6 could compromise the company in litigation such as
7 this.

8 Q And connect those dots for us. What do
9 you mean "producing evidence"?

10 A Well, if you know that you have
11 radioactive material in your cigarettes, are putting
12 it in there, that means that you are acknowledging
13 that that could be a cause of disease. And the
14 official position of Philip Morris at that time was
15 that there was no relationship -- well, that the
16 relationship between disease causation and smoking
17 had not been established. So it wouldn't look very
18 well for Philip Morris to have data which helped
19 establish that relationship.

20 Q Let's talk about that for a minute. The
21 official position of Philip Morris -- while you were
22 working there -- to the outside world about smoking
23 and its relationship to disease, and particularly
24 lung cancer, was what?

25 A The official position was that there

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1 wasn't enough scientific evidence to prove -- as we
2 had discussed earlier -- that smoking caused any
3 disease.

4 Q And what was the official position as to
5 whether smoking and nicotine was addictive when you
6 were there?

7 A A similar kind of logic, that there wasn't
8 sufficient scientific information to prove, like the
9 balls going down the Columbia River, that it caused
10 addiction.

11 Q And has that position ultimately changed?

12 A Yes, it has.

13 Q When did it change?

14 A Uhm, 1999, approximately November --
15 actually the first time I became aware of it was
16 November of 1999.

17 Q And through what organ or methods of
18 communication was that expressed?

19 A It was expressed on the Philip Morris web
20 site.

21 Q All right, sir. Talking about one last
22 issue in this area. Was cardiac disease amongst the
23 health concerns, and were their projects aimed at
24 trying to fix that or work on that aspect of
25 smoking-related disease?

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1 A Yes, there was.

2 Q And what was some of the efforts done in
3 that regard?

4 A Well, if you removed all the tar and you
5 only had nicotine, you would remove -- nicotine,
6 itself, doesn't cause cancer, so you would reduce
7 the cancer. You would reduce emphysema, possibly,
8 but you would still be left with cardiovascular
9 disease. So the attempt was made to develop
10 chemicals -- they are called analogs, A-N-A-L-O-G-S,
11 that would give you the same interaction in your
12 brain that nicotine had, but would not increase your
13 heart rate by about six beats per minute and
14 constrict your veins, which is what nicotine does.
15 So it would not put extra work, if you will, on your
16 heart.

17 So we were in the process of
18 synthesizing chemicals that would act like nicotine,
19 but would not have the negative effects of nicotine
20 with regard to the cardiovascular -- to aggravating
21 the cardiovascular system.

22 Q And who worked on that nicotine analog?

23 A There is a group of people that worked on
24 it. I was involved in some of the ideas for the
25 kinds of chemicals that you could make. The

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1 Chemical Research Division, a fellow name Dr. Jeff
2 Seaman, Dr. Bill Edwards, Dr. Ted Sanders, Dr.
3 Youminier, they actually synthesized the chemicals.
4 Then the chemicals were given over to the Behavioral
5 Research Group, where they were studied in rats --
6 the rat being a good model. The issue is that if
7 you know that something happens in humans, you try
8 to find an animal where the animal system mimics
9 what happens in humans. The rat is a good model for
10 many things that happen in humans. And rat studies
11 were done in the beginning by Dr. Carolyn Levy and
12 then eventually by Dr. Victor DeNoble and Dr. Paul
13 Melay. And the whole objective here was to find
14 these chemicals that ultimately could be used to
15 replace nicotine and not have the cardiovascular
16 problems.

17 Q We'll talk about Dr. Victor DeNoble in a
18 minute.

19 Another question related to efforts
20 at reducing carcinogens. There was someone in the
21 courtroom who has read approximately 25 percent of
22 prior testimony given by a Dr. Uydess. Are you
23 familiar with Dr. Uydess?

24 A Yes, very much so.

25 Q What was Dr. Uydess involved in, so you

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1 can sort of preview for us what the rest of that
2 testimony from that deposition is going to tell us?

3 A Well, Dr. Uydess was hired by myself to be
4 involved in research that we were doing. His
5 particular specialty had to do with the
6 microbiological and structural ideas behind tobacco.

7 Dr. Uydess was involved in the
8 naturally occurring denitrification project. He was
9 one of the key people in that project.

10 Q Okay. Now, then I want to talk to you
11 about a couple more documents, and we'll then
12 conclude.

13 Again, Dr. Seligman was your
14 immediate superior?

15 A That's correct, up until about 1982.

16 Q And are you familiar with a letter -- this
17 is Exhibit 202, which the jury has seen before --

18 A Yes.

19 Q -- that he wrote to a Dr. Alex Spears of
20 P. Lorillard?

21 A Yes.

22 Q Just in case some of this escaped us, what
23 is P. Lorillard?

24 A Lorillard is another cigarette company.

25 Q This is referring to research. Who or

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1 what organization was going to do this research?

2 A The organization, the Center for Tobacco
3 Research, known as CTR. "Dear Alex: Mr. J.C.
4 Bowling of our New York Office asked that I send you
5 our recommendations for industry research, which we
6 prepared last year. To that end, you will find
7 attached a list entitled, 'Potential Long-Term
8 Scientific Studies,' which Dr. Osdene and I
9 generated early this year. Additionally, I have
10 added a list of three subjects which I feel should
11 be avoided."

12 Now, were you involved in the
13 preparation of these lists in any way?

14 A Yes, I was.

15 Q Were you involved in the preparation of
16 lists of the subjects to be avoided?

17 A No. I was involved in the discussion
18 between Dr. Osdene and Dr. Seligman that resulted in
19 the generation originally, the prior year, of the
20 list.

21 Q And the list of long-term scientific
22 studies, this one?

23 A Both lists. Both of these lists were
24 prepared by Dr. Osdene.

25 Q And were you familiar with the

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1 subjects-to-be-avoided list?

2 A Yes.

3 Q And what was the purpose of that?

4 A These topics were considered by
5 Dr. Osdene, as explained to us at the meeting, to be
6 the most difficult to be able to refute. And I can
7 go into some detail on that. But basically, they
8 speak for themselves. The more that you did in
9 these areas, the more difficult it would be to
10 maintain the position that sufficient scientific
11 evidence had not been developed to determine that
12 smoking caused cancer.

13 Q And did you think that this was a good
14 idea to avoid these subjects?

15 A No.

16 Q Did you voice your concern about that?

17 A Well, I voiced my concern over the period
18 of time I was there in many different ways. We
19 discussed how you were going to do that and how you
20 would get this done. And the idea was that, well,
21 we may want -- we may look into doing it
22 ourselves -- again, using Europe rather -- but we
23 didn't want it to become public information.

24 Q How did that compare with how you would
25 have done things at Lever Brothers?

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1 A Well, at Lever Brothers, if you knew you
2 had a problem, the product that you were selling,
3 you would try to work with the public health
4 authorities, regulators, whatever, to solve that
5 problem so that you would reduce the problem.

6 Most problems of toxicity in things
7 that people come in contact on a daily basis are
8 solved much more easily that way, because you have
9 more people giving you opinions -- you may not agree
10 with them all, but the point is that you have more
11 evidence that you are moving in a direction that the
12 majority of scientific opinion and medical opinion
13 says you should move in as opposed to taking the
14 position that the majority doesn't know what they
15 are talking about.

16 Q Now, we're going to talk a little bit more
17 about Dr. DeNoble's research and the involvement --
18 this is Exhibit 234. The jury has seen this before.
19 The involvement of Shook, Hardy & Bacon. Are you
20 familiar with who they are?

21 A Yes.

22 Q Who are they, for the record?

23 A It's a law firm in Kansas City that Philip
24 Morris used.

25 Q And this letter of July 27th, 1983 to a

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1 Mr. Newman -- who is Mr. Newman?

2 A Mr. Newman is associate general counsel
3 of, actually, Philip Morris U.S.A., I thought. But
4 this says Philip Morris International.

5 Q It's from Patrick Sirridge. Who is he?

6 A I have don't know him personally.

7 Q Have you had a chance to review this
8 document?

9 A Yes.

10 Q Okay. It makes mention of several
11 different studies by Dr. DeNoble, who you have also
12 previously mentioned, correct?

13 A Yes.

14 Q Okay. Let's go to the end here.

15 "Conclusion: Research engaged in as well as some
16 possibly under consideration by Philip Morris has
17 undesirable and dangerous implications for
18 litigation positions the industry takes in regard to
19 smoking behavior. The pharmacological nature of the
20 research implies strongly a view of the importance
21 of nicotine. What is worse, research reports under
22 Philip Morris sponsorship contain claims of
23 physiological tolerance to nicotine as well as
24 claims of unequivocal demonstrations of
25 reinforcement by nicotine in animals."

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1 Let's stop right there. Were you
2 aware of the work Dr. DeNoble was doing when he was
3 doing it?

4 A Absolutely, yes. The work was presented
5 to groups of management -- senior management,
6 managers and directors at Philip Morris. His
7 project would be reviewed annually, and sometimes
8 there would be an intermediate report generated and
9 presentation made.

10 Q So there is no mistake about this, you
11 worked at Philip Morris at the same time as
12 Dr. DeNoble?

13 A That's correct.

14 Q And do you agree with the characterization
15 so far -- and I have read it in this letter -- about
16 his research?

17 A That was the intent of the research, was
18 to be able to study chemicals that we could make to
19 substitute for nicotine. So in order to do that, we
20 had to have the same kinds of physiological
21 tolerance, same kinds of reactions, yes.

22 Q These are what are called the nicotine
23 analogs; is that correct?

24 A That's correct.

25 Q You described an analog to us early this

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- 1 morning -- it seems almost a day ago. Ibuprofen
2 would be an analog for?
3 A Aspirin.
4 Q A similar type of substance?
5 A It has some of the same effects, but you
6 change it just enough so it doesn't have the
7 negative effects.
8 Q "This kind of research is a major tool of
9 our adversaries on the addiction issue; the irony is
10 that industry-sponsored research is honing that
11 tool. In the final analysis, the performing and
12 publishing of nicotine-related research seems
13 clearly ill-advised by from a litigation point of
14 view." Are you aware of that statement in that
15 letter?
16 A Yes.
17 Q Okay. Now, what happened to Dr. DeNoble?
18 A Dr. DeNoble was terminated; his project
19 was shut down.
20 Q What happened to his laboratory?
21 A It was actually destroyed.
22 Q How long -- over what period of time did
23 that take place?
24 A One day.
25 Q When you were at Lever Brothers, did you

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1 have an occasion for the company to face a difficult
2 period or a problem with one of its products?

3 A Several occasions, yes.

4 Q And could you -- do you think that your
5 company behaved as a reasonable company under those
6 circumstances?

7 A I believe so.

8 Q Do you think they met the standard of care
9 of a reasonable company under the circumstances?

10 A Yes. We withdrew the product from the
11 market and changed the formulation of the product.
12 We went to the Consumer Product Safety Commission
13 with what we felt was a better way to protect the
14 consuming public from misuse. An example might
15 help.

16 Q Could you give the jury some examples? I
17 understand you can recall a couple incidents
18 occurred there, if you can tell us.

19 A Quite a few, actually. But for example,
20 we had a product that was an aerosol can with a gas
21 in it. Instead of using lye to clean out your
22 drain, you would use this can, put it over the hole,
23 push down on it, a spurt of gas would come out,
24 clean it out. The gas we used at that time was
25 freon, later to be a greenhouse gas. At the time it

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1 was not an issue. It was selected because it was
2 safe.

3 The problem with it is that we became
4 concerned or my chief toxicologist become concerned
5 that children, especially teenagers, might pump that
6 stuff into a bag, stick their head in there and get
7 what we call asphyxiation high, where you deprive
8 yourself of oxygen and get high.

9 So because we were concerned that
10 might be a possibility, we went to the Consumer
11 Product Safety Commission and asked them if it was
12 okay. What we did was put in a tiny bit of pepper
13 oil. That meant with a tiny bit of pepper oil, if
14 you discharged this into the air, it would make your
15 eyes irritated. The point was no one could stick
16 their head in a bag. The Consumer Product
17 Protection Division said that was a good thing to do
18 to prevent abuse.

19 Another example, we found women were
20 reacting to Dove Liquid Detergent. They washed
21 dishes. If they didn't use gloves, a lot of women,
22 specially older women, would get rashes on their
23 hands. We did a lot of tests on panels of women.
24 We went back, did a retesting. Sure enough, we
25 found a population of women that seemed to be

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1 allergic to that product.

2 It turned out after a lot of analysis
3 to be these chemicals are stored in stainless steel
4 tanks, much like the ones you saw in the video. And
5 they pick up small amounts of nickel from the
6 stainless steel tank.

7 In the '40s, '50s, the brassiere
8 straps women wear were made out of little stainless
9 steel clips sitting in the middle of their back.
10 Over a period of 20 years, a lot of women would
11 become sensitive to that nickel on their back, and
12 they couldn't wear the straps anymore because they
13 would get a rash in the middle of their back. Then
14 when those same women used our product, they would
15 get a rash on their hands. So we recalled the
16 product, and we put material in there that would
17 bind all of the nickel so that it could not access
18 the womens' hands.

19 Those are just a couple. We had
20 several examples like that with toothpaste and other
21 things.

22 Q Did you ever come across a situation at
23 Lever Brothers in which the lawyers would regulate a
24 kind of research and the kind of work that you would
25 do with the product?

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1 A No.

2 Q Did you ever come in contact -- experience
3 a situation at Lever Brothers where the lawyers
4 would terminate one of the scientific staff because
5 of the research that they had done?

6 A Not the research, no. Maybe for an
7 inpropriety, stealing some information, something
8 like that, but not having anything to do with the
9 conduct of the research.

10 Q Did you ever come in contact or experience
11 a situation at Lever Brothers where the lawyers
12 dictated the kind of research that the corporation
13 could do to make a safer product?

14 A No.

15 Q In your view, would it have been
16 reasonable for the lawyers to intervene in the
17 process that way?

18 A No.

19 Q In connection with your membership in
20 professional organizations and your awareness of
21 standards of reasonable conduct and ethics, and also
22 in your experience and training in the industries
23 that you have been involved in, have you come across
24 something known as the General Rule of Product
25 Safety for Manufacturers?

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1 A Yes.

2 Q Let me read it to you, and -- well, what
3 the heck. I'm going to let the jury see my notes,
4 and we'll just put it up here and you can talk about
5 it.

6 "Any risk of serious injury or death
7 is always unreasonable and always unacceptable if
8 technically feasible and economically feasible
9 alternative designs would reduce or eliminate the
10 risk."

11 What does that mean?

12 A It means that if you have something which
13 you know causes a risk, you have -- in order to be
14 reasonable, you have an obligation to change it to
15 reduce that risk. And you have an obligation to do
16 everything you can to make that risk as minimally --
17 minimize that risk the best you can.

18 Q What if it is not economically feasible to
19 make a change that is technologically available?

20 A That is exactly the problem I was faced
21 with when I went to Philip Morris. If you can't do
22 it, then you find another business.

23 MR. WOBBROCK: Your Honor, at this time I
24 have an offer of proof that I would like to
25 make to the Court.

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1 THE COURT: All right. We'll have the
2 jury step out. And just before you step out,
3 the Court mentioned the other day that we might
4 work on Saturday. The Court really wasn't that
5 enthusiastic when I mentioned it. That's off
6 the table now.

7 (Jury out.)

8 THE COURT: You may proceed with your
9 offer of proof, counsel.

10 MR. WOBBROCK: Your Honor, out of respect
11 to this Court, our procedures and the law, I
12 make this offer of prove out of the presence of
13 the jury so the Court can rule on it. I
14 anticipate we're going to hear from our worthy
15 opponents here.

16 BY MR. WOBBROCK:

17 Q Toward the end of your time at Philip
18 Morris, in 1984, was there a change in attitudes
19 about certain issues in the company and conduct of
20 certain people in the company towards those issues?

21 A Yes, there was.

22 Q And did that affect your desire to want to
23 stay there and your willingness to continue to work
24 there?

25 A Well, it affected -- it was actually

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1 involved directly in my termination.

2 Q And can you tell the Court what happened
3 that evidences the changes in attitude and behavior
4 that was related to your termination?

5 A Well, I testified earlier today at various
6 times there was assertions or discussions that we
7 had about the potential for promotion. Clearly on
8 the basis which I was hired, if Philip Morris was to
9 be involved in a regulatory environment where I had
10 experience and expertise, I would have been very
11 helpful to them in getting that done.

12 At the end of 1983, worked for a Dr.
13 Hausermann, who worked for a fellow named Wallace
14 McDowell, whose name was on one of the earlier
15 charts. Mr. McDowell ordered Dr. Hausermann to
16 announce to the directors that I would be promoted
17 to replace him in approximately six months to a year
18 when Dr. Hausermann went back to Europe. I viewed
19 this as being an expression of interest in changing
20 the roles. I would finally have some greater say
21 over what Dr. Osdene did and how it was being done;
22 that we would be moving toward a different kind of
23 environment. However, I was worried that -- I don't
24 like the idea of someone telling me, "In X months
25 you will get promoted." Why not get promoted now?

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1 Dr. Hausermann wouldn't answer that question. But
2 he went ahead and made the announcement even though
3 I wasn't comfortable with it. And within two weeks,
4 Mr. McDowell wasn't with the company, gone,
5 terminated. He was replaced by a fellow named
6 Mr. James Remmington. What's this all about?
7 What's going on? Mr. Remmington was very cordial,
8 and he said, "Well, nothing has changed. We're
9 just -- it was a change in management: Mr. McDowell
10 had a disagreement with his superior, who was
11 Mr. Pollock.

12 Meanwhile, previous to that, my wife,
13 under a -- the terms of a consent decree, had been
14 selected for advancement within the company under a
15 decree where Philip Morris agreed that they would
16 increase the representation of both women and
17 minorities in management. So she was at a different
18 location, actually working at the stemary.

19 As time went on, Dr. Hausermann
20 started assigning more and more tasks. In April of
21 1984, one task that I was assigned was to go to a
22 meeting where a fellow named Fred Newman, whose name
23 we saw on a document, Mr. Newman would come down
24 from the New York office and explain to us certain
25 changes that were going to be made. And so I went

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1 to the meeting in Mr. -- in Dr. Hausermann's place.
2 He had to go somewhere. I forget where it was. But
3 I was going to tell him afterwards what went on.

4 And at that meeting, Mr. Newman told
5 us they were going to shut down Dr. DeNoble's
6 project. This came as a great shock they were going
7 to shut down the project. The reason he told us
8 they were going to shut down the project is because,
9 in his words, they were going to use or go into what
10 he called the "ostrich defense". They were not
11 going to do any further research that could endanger
12 the position of the company with regard to the
13 issues of disease causation or addiction.

14 I questioned that again. Dr. Osdene
15 was there. Mr. Lou Turano was there. Mr. Richard
16 Thompson was there, and Mr. Leo Meier was there.
17 And so I questioned that, and I pointed out to
18 Mr. Newman that some of us, myself and some other
19 scientists, had openly expressed at outside
20 scientific meetings at universities, at
21 presentations to tobacco firms, our understanding of
22 the disease causation issue, because we had talked
23 about things that we were removing that caused the
24 disease and certainly had discussed the idea of
25 using nicotine analogs and trying to reduce the

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1 cardiovascular disease.

2 Dr. Newman -- Mr. Newman said all
3 such discussion would no longer be allowed. And the
4 rationale was apparently in the year before, around
5 August or September of that year, a lawsuit had been
6 filed against Philip Morris. And in defending for
7 that lawsuit, they wished to have no information
8 available for that or any other lawsuit that would
9 put them in a bad position.

10 We were instructed to go back and not
11 only discuss this with our people, but it was also
12 pointed out -- I asked the question: "Will Vic --
13 Dr. DeNoble or Paul, Dr. Melay, go out and talk
14 about this?" I won't repeat exactly what he said,
15 because it's a little bit profane. But the basic
16 idea was that, "We would sue them if they did that,
17 and we're going to tell them that. And that we will
18 sue anybody that works for us that admits that we
19 caused cancer or an addiction. And you should go
20 back" -- we were instructed to go back and tell our
21 employees, people that reported to us, that the
22 company was no longer going to allow people to make
23 such comments anywhere other than within the closed
24 system.

25 Well, a few weeks after this, my

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1 wife was informed that she would not be promoted.
2 The reason given for that was that she was female.

3 THE COURT: That she was what?

4 THE DEFENDANT: Female. The -- my wife,
5 feeling that she was put in that position as
6 part of the consent decree in the first place,
7 filed a complaint with the Equal Opportunity
8 Employment Commission.

9 So I went to my boss, said, "Okay I better
10 leave or whatever?" "No. No. What you need
11 to do is consult an attorney, because I can't
12 help you, especially" -- I got a little bit
13 ahead of myself.

14 Subsequent to that, I was told by
15 Mr. Remington that I would no longer be
16 promoted. And I asked the question, "Well, is
17 this connected with my wife's thing, or is this
18 connected with the fact that I have probably
19 said -- they wouldn't tell me. Max wouldn't
20 tell me -- Dr. Hausermann. He told me what I
21 needed to do was go and consult an attorney.

22 I didn't know any attorneys. So I went
23 and consulted the only attorney I knew, who was
24 the attorney my wife was using for the OEC
25 complaint. He advised me to join her complaint

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1 immediately and file a complaint. But I felt
2 that was unfair to Max, Dr. Hausermann.

3 So I wrote him a note -- which has been
4 the subject of prior trials; the note has been
5 shown -- where I said, "I think this is unfair.
6 I think this is due to my wife's complaint. I
7 have been retained by a lawyer to do this, but
8 I won't do it until I've had a chance to talk
9 to you."

10 Well, as my lawyer pointed out
11 subsequently, that was a big mistake. Because
12 the next thing I knew, he was supposed to be on
13 vacation. I gave that to his secretary in an
14 envelope to give to him on his vacation. Next
15 thing I knew, on July 6th I was called into an
16 office, where I was notified that I was being
17 terminated for insubordination by the head of
18 Internal Relations. The act of insubordination
19 was getting a lawyer and talking to my
20 employees about it.

21 Well, Max also indicated not only should I
22 talk to my employees -- that was part of
23 succession planning. They knew my wife had
24 filed a complaint. I was trying to keep
25 everything cool so that they would not be

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1 unhappy working at Philip Morris.

2 So I'm told that I am being fired for
3 insubordination, I should be escorted off the
4 premises. Dr. Hausermann says to me, "That's
5 not why you are being fired. I guarantee you
6 that. And we're not going to escort you off.
7 We are going to go back to the Research and
8 Development Center. We're going to assemble
9 the people and tell them you resigned, because
10 I don't want this to be a hostile leaving."

11 They did that. We called an assembly. I
12 sat in the back. They talked about my
13 resignation. I agreed and, over the course of
14 the next few months, worked out an arrangement
15 by which I would -- she and I would both leave.
16 So that -- that was the result of my
17 termination.

18 But the issue in my mind as to what
19 the actual cause of the termination is -- I mean, I
20 know what I was told. One person told me I was
21 terminated for insubordination. The other said,
22 "You resigned by mutual agreement of the company."
23 That's the story of how I left.

24 Q And in your mind, speaking out to
25 Mr. Newman about the issues he spoke to you about

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1 may have some direct bearing on the reason for your
2 termination?

3 A Yes.

4 MR. WOBBROCK: Your Honor, that would be
5 our offer of proof. We intend to offer that
6 evidence with the Court's permission.

7 THE COURT: Counsel for the defense?

8 MR. PHILLIPS: Can we have a moment, Your
9 Honor?

10 MR. DUMAS: Thank you.

11 MR. DUMAS: Your Honor, I appreciate
12 counsel's offer of proof. And we have no
13 objection to this line of testimony.

14 THE COURT: All right. Very well.

15 MR. WOBBROCK: Rather be safe than sorry,
16 Your Honor. I can finish slightly before 5:00
17 I think.

18 THE COURT: Let's do it.

19 (Jury in.)

20 THE COURT: All right. Counsel, you may
21 proceed with your questions of this witness.

22 MR. WOBBROCK: Thank you very much, Your
23 Honor.

24 BY MR. WOBBROCK:

25 Q There came a time that you left Philip

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1 Morris, correct?

2 A That's correct.

3 Q Towards the end of your tenure there, in
4 1984, did you observe and experience a change in
5 attitude at Philip Morris about certain issues?

6 A Yes, I did.

7 Q Is it related in your mind, in part, to
8 your leaving?

9 A In part, yes.

10 Q Can you tell the jury what happened?

11 A I think I testified earlier today -- I
12 don't think; I know -- I testified earlier today
13 about discussions of potential promotion that
14 occurred for me during times that I was there
15 earlier when Dr. Max Hausermann replaced Dr. Robert
16 B. Seligman. At the end of 1983, in the fall of
17 1983, I reported to Dr. Max Hausermann. Dr. Max
18 Hausermann reported to a fellow named Wally --
19 Wallace McDowell. Mr. McDowell ordered my superior,
20 Dr. Hausermann, to announce to the people, the
21 directors, people at my level at R&D, that I would
22 succeed Dr. Hausermann when Dr. Hausermann returned
23 to Europe. I viewed this very positively, because I
24 thought in talking with Dr. Hausermann that this
25 signaled a change in the way we would do things. I

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1 would have more control, for example, over the whole
2 smoking and health program. In that position,
3 Dr. Osdene would report to me, so I would have more
4 control over what was done.

5 Within two weeks of that announcement
6 being made -- I didn't like the -- back up a minute.
7 I didn't like the idea that it was going to be six
8 months or some period of time away, because a lot of
9 things can happen in six months. So I was a little
10 worried about that. But Dr. Hausermann said the
11 announcement wasn't negotiable. He was ordered to
12 do that, so he did it. And within two weeks of him
13 doing that, the fellow who ordered him to do that,
14 Mr. McDowell, was no longer with the company.
15 Mr. McDowell was replaced by a gentleman, whose name
16 was Mr. James Remmington. We had further
17 discussions. Mr. Remmington said that as far as he
18 was concerned, there would be no changes in what was
19 going to take place. And again, we were looking at
20 projects like a lot of the ones we were talking
21 about.

22 We had in Philip Morris a succession
23 plan, so we knew who would be succeeding us. We had
24 laid out that program. So this was discussed among
25 the employees generally.

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1 My wife, who also worked at Philip
2 Morris, had previously been selected to move into a
3 position of assistant plant manager in a place
4 called stemary. Stemary is a location where they
5 took these tobacco leaves and broke out the lamina
6 and stems. And she was selected for that position
7 on the basis of a consent decree that Philip Morris
8 had signed -- or at least this is what she was
9 told -- where Philip Morris had agreed to promote
10 women and minorities because of underrepresentation
11 in the management ranks. And she went over there
12 to -- in understudy to the plant manager.

13 Approximately April of 1984 -- this
14 is several months after this happened --
15 Dr. Hausermann used me in roles of being his
16 substitute at meetings. I was asked to go to a
17 meeting where very important information would be
18 given to us by people from New York. So I went to
19 the meeting on his behalf.

20 There are other directors that you
21 saw in these charts. At that time it was
22 Mr. Turano, Mr. Meyer, Mr. Thompson and Dr. Osdene
23 and I who went to this meeting. Dr. Hausermann
24 couldn't be there. And at that meeting, we were
25 informed that the fellow who gave the presentation

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1 at this meeting was the assistant general counsel.
2 He was a lawyer for Philip Morris. And we were
3 informed that Dr. DeNoble's project would be shut
4 down.

5 Q What was this lawyers' name?

6 A Fred Newman.

7 Q Was that Mr. Newman we saw on prior
8 stationery?

9 MR. DUMAS: Excuse me, Your Honor. I
10 apologize to counsel and to the witness and to
11 the Court, Your Honor. I would have a matter
12 for the Court. I'm sorry.

13 THE COURT: All right. We'll have the
14 jury to step out and get a little exercise.
15 We'll have you back in in a few moments,
16 hopefully.

17 (Jury out.)

18 THE COURT: All right. Counsel, your
19 matter, please.

20 MR. DUMAS: Thank you, Your Honor. Again,
21 I apologize to counsel and to the Court.

22 Your Honor, during the offer of proof, I
23 recalled no such testimony that the meeting and
24 the words from an important person from New
25 York came from a lawyer or assistant general

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1 counsel at Philip Morris. If that was stated,
2 I missed it, and I apologize to everyone. I
3 didn't hear it.

4 Your Honor, it would seem to me that any
5 communication between an attorney and the
6 Philip Morris legal department and these
7 directors would be privileged. That's the
8 basis of my objection.

9 I don't know the background of this. I
10 need to make the objection to preserve the
11 record on the issue.

12 THE COURT: Counsel?

13 MR. WOBBROCK: I'll let Mr. Tauman speak
14 for me, Your Honor.

15 MR. TAUMAN: I'm not sure what the record
16 shows here, and whatever error or whatever
17 objection is being preserved is just part of
18 the record. But the fact is that Mr. Dumas
19 either wasn't listening, as he should have --
20 Your Honor heard -- everyone in the courtroom
21 heard -- in fact, Mr. -- Dr. Farone actually
22 made reference back to the person who received
23 the letter that happens to be up on the board
24 right there. And I believe Mr. Phillips knew,
25 because he reacted to it. Mr. Phillips can

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1 stand up and say he didn't, but I also was
2 standing right here when Mr. Dumas and Mr.
3 Phillips had their discussion just now.

4 The fact is that this was amply clear.
5 This is the most -- the most overt type of
6 waiver where two lawyers sit through a
7 testimony that overtly and specifically and
8 without any question or doubt and on several
9 occasions makes a disclosure of an
10 attorney-client privilege. That was the whole
11 purpose of this process. And I don't think
12 that the Court should countenance a second bite
13 of this apple. Your Honor, I have no question
14 in my mind, as I sit here and I watch the body
15 language of my colleagues here, at least one of
16 them knew exactly what was going down. They
17 had their conference there. We all saw it.
18 And this is a waiver.

19 We are prepared to argue the merits of
20 this, because clearly this was a fraud that was
21 attempted to be committed on the public, on the
22 parties in litigation. It's the same type of
23 fraud that we have seen the lawyers of Philip
24 Morris perpetrate over and over and over gain.
25 It's the same type.

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1 We're prepared to argue this on the
2 merits, but we really shouldn't have to. It is
3 a waste of the Court and the jury's time.

4 MR. PHILLIPS: Your Honor, I don't know
5 what kind of body language he was getting. I
6 did have a conference with Mr. Dumas regarding
7 this. I am quite confident -- and I can pull
8 the record up -- that when the witness went
9 through his offer of proof, he indicated an
10 individual came down, Mr. Newman, from Philip
11 Morris to Richmond. Neither Mr. Dumas nor I
12 appreciated at the time he was a lawyer. When
13 he testified to the jury, he said "an assistant
14 general counsel came down" -- and that's what
15 triggered the concern.

16 Now, counsel was ready for this, because
17 they liked the trick they pulled over in the
18 offer of proof. They have got the document
19 that shows if we had been paying attention to
20 the exhibits they showed earlier we would have
21 remembered that name, remembered that he was a
22 lawyer. If you want to make me constructively
23 responsible for remembering an exhibit with a
24 person's name given the number of names we have
25 here on this day and a number of other days,

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1 that's your prerogative. But clearly, I did
2 not appreciate it, and Mr. Dumas didn't
3 appreciate it. And what we heard was this
4 appears to be a non-privileged conversation.
5 We don't have a basis for excluding it.
6 Therefore, we think it can go in subject to
7 cross-examination.

8 The first time we appreciated it was when
9 he have said it. That's when we raised it.

10 Now, counsel is raising the issue of a
11 crime fraud exception to the privilege. Now, I
12 think he needs to argue that. I think he
13 should have alerted us to that as the basis for
14 the offer of proof at the outset rather than
15 trying to trick us through this process.

16 But there was no indication -- other than
17 the fact there was a reference to a lawsuit --
18 that this is a lawyer talking. Frankly, I
19 interpreted as being an executive coming down
20 to talk to other executives about their
21 strategy with this research. If I
22 misunderstood -- obviously, I did -- it was not
23 because of something that was said by the
24 witness. The witness did not mention this was
25 a lawyer who came down to give the advice to

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1 Dr. Farone.

2 THE COURT: Counsel, what is the
3 difference -- what I'm concerned about now is
4 we have heard some testimony already about
5 lawyers becoming research scientists, telling
6 the research scientists don't do this project,
7 don't do that project, terminate that project,
8 don't do this, don't go into that because it
9 could hurt Philip Morris in litigation. That
10 is already before the jury. That's already
11 been presented to them without objection. I
12 heard no --

13 MR. PHILLIPS: Your Honor, all those
14 exhibits --

15 MR. WOBBROCK: Just a minute. Just a
16 minute. I want to listen to the Court, not you
17 for a change, okay? So quit interrupting him.

18 MR. PHILLIPS: Excuse me. Let me
19 apologize, and not with the prompting of
20 counsel. I apologize for interrupting.

21 THE COURT: You are talking about your
22 earlier. I was talking about it was a request
23 for a continuing objection or whatever. We
24 have got evidence before the jury about that we
25 have some -- that before the jury. I don't see

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1 whether this is any different than -- than that
2 material other than some of the material was
3 written on a letter from Shook, Hardy & Bacon.
4 And this matter, the gentleman just came down
5 and called the directors together and said,
6 "That research that Dr. DeNoble is doing is out
7 of here." We are not going -- you know, he
8 didn't -- I didn't hear any reference that he
9 was a research scientist, they had done there
10 own independent research, because I think
11 probably you start getting research scientist,
12 a lawyer would be about the worst you could
13 find for a research scientist. You would never
14 get anything done, because one would be
15 advocating one position. The other would be
16 advocating another position, and the truth
17 would never come out. So that's why a
18 lawyer -- that's why we are not research
19 scientists, I guess. We have more subjectivity
20 and more art in what we do than science.

21 MR. PHILLIPS: May I respond, Your Honor?

22 THE COURT: So that's why they keep us
23 away from being objective scientists.

24 All right. Go ahead.

25 MR. PHILLIPS: I didn't mean to interrupt.

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1 Sometimes I'm interpreting your pause as
2 finishing, and I apologize.

3 Now, let's sort out the issues that you
4 have raised. Your Honor has, in fact, ruled
5 against Philip Morris in this case on a number
6 of documents, and you have concluded either
7 that they are not privileged or that they are
8 subject to the crime fraud exception.

9 THE COURT: Correct.

10 MR. PHILLIPS: In fact, your rulings don't
11 actually identify which is the basis for your
12 ruling, but you have allowed these documents
13 in.

14 So the documents that you are talking
15 about are documents that have come in as a
16 result of an objection, and I asked for a
17 continuing objection at the outset before trial
18 with respect to all of your rulings in limine
19 so that I don't have to interrupt every single
20 time. So that explains why they are there.
21 Okay?

22 And with respect, Your Honor, it's simply
23 not fair to say it's coming in without
24 objection. Obviously, it is.

25 THE COURT: All right. The Court is

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1 corrected on that. Counsel, proceed.

2 MR. PHILLIPS: You raised a different
3 point. I want to address that next point.

4 The question is how is this, this
5 testimony about a lawyer -- now it's a lawyer
6 coming down to say we're going to close down or
7 we're going to take the Ostrich approach or
8 whatever the witness just said in the offer of
9 proof -- how is that different than the rulings
10 that you have already made like on this
11 document, which was facially privileged, but
12 you allowed to go in either because you
13 concluded it was not privileged or because you
14 concluded it was subject to the crime fraud
15 exception.

16 Your Honor, I have to say that consistent
17 with your rulings, I expect that this testimony
18 would be treated the same way as you have
19 already treated it. I'm not going to try to
20 split hairs here. In other words, I think the
21 way you have ruled -- I think it has been
22 incorrect, and I have made any record on that.
23 But the way you have ruled on this document
24 would likely lead you to rule to allow this
25 testimony to come in based on a conclusion that

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1 the crime fraud exception has been met.

2 What Mr. Tauman is talking about is he
3 read some body language from me that I actually
4 knew something I didn't know. Now, I
5 appreciate that Mr. Tauman believes that I have
6 greater prescience and understanding what's
7 going on in the courtroom that in some ways I
8 don't.

9 I will represent to Your Honor I had
10 absolutely no idea or didn't appreciate at the
11 moment, given the offer of proof, that
12 Mr. Newman was a lawyer and that it was a
13 privileged conversation. He's talking about
14 waiver, because they set this up to try to
15 trick us. And we, in fact, did not appreciate
16 it. We fell for the trick. And as soon as we
17 found out about it, we let the Court know about
18 it.

19 There is a difference between waiver in
20 the courtroom and crime fraud exception to the
21 privilege rule.

22 This is obviously -- now, it's clear he
23 said it; we have stopped. I apologize for
24 that. Mr. Dumas has apologized for it. Now we
25 know it's a privileged conversation.

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1 You have two issues in front of you. One
2 is did we waive it, as Mr. Tauman says? And I
3 submit to you we have not waived it. The offer
4 of proof did not identify it was a privileged
5 conversation. As soon as we heard that, we
6 flagged the issue, and we were back before the
7 Court on that issue.

8 The second issue is if we have not waived
9 it, is this testimony none the less admissible
10 under the crime fraud exception consistent with
11 your previous rulings? Now, I'm not going to
12 waste my breath on that, Your Honor. You have
13 already ruled against us on that. I appreciate
14 that. And if that's what you are going to rule
15 here, okay. But you should do it on the basis
16 of your own belief as to whether it's waiver --
17 first, is it a privileged communication? If it
18 is a privileged communication, was it waived
19 because of the strategy employed by Mr. Tauman
20 and Mr. Wobbrock? If not, is it subject to the
21 crime fraud exception?

22 Now, for the record, just to be clear, I
23 believe it is a privileged conversation. It
24 does not reflect any kind of crime fraud as the
25 requirements of crime fraud are established and

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1 as I briefed for the Court before, and it
2 should not, in fact, come in as testimony at
3 all.

4 But I think we need to sort out the
5 various arguments that are being bounced around
6 the courtroom here and the record we have thus
7 far with the Court's rulings on privilege. I
8 hope I have been clear.

9 THE COURT: I think you are clear,
10 counsel. Do you have a short response?

11 MR. TAUMAN: We do not, Your Honor. Thank
12 you very much.

13 THE COURT: All right. Regretfully, a
14 person that probably does not carry a lot of
15 overall respect concluded that unreasonable
16 consistency is the hobgoblin of small minds. I
17 might fall in that category and make the same
18 ruling. It's a crime fraud exception and will
19 be allowed.

20 Proceed; bring the jury in jury.

21 It was Karl Marx that made that statement.

22 MR. TAUMAN: Groucho Marx?

23 THE COURT: No Karl Marx.

24 (Jury in.)

25 MR. WOBBROCK: Mrs. Keating, would you go

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1 back and read the prior question and answer?
2 (Whereupon, the previous question and answer were
3 read by the court reporter as requested.)

4 BY MR. WOBBROCK:

5 Q Was this the prior stationery they are
6 referring to, Dr. Farone, the exhibit on the viewer,
7 234?

8 A Yes.

9 Q You are telling us what Mr. Newman,
10 general counsel for Philip Morris, was telling you
11 and others at a meeting in April of 1984; is that
12 correct?

13 A Yes.

14 Q Okay. And I don't know if you got to the
15 part -- how far you got into that, because it has
16 been ten minutes or so, but would you start over
17 about that meeting, please?

18 A Okay. I went to that meeting under the
19 direction of my superior, Dr. Max Hausermann, to
20 find out something that he said was going to be very
21 important, an announcement that was going to be
22 made.

23 At the meeting it was disclosed that
24 a ruling had been made that Philip Morris was going
25 to close down all research that would in any way be

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1 used against the company on the issue of either
2 addiction or on the issue of disease causation.
3 Specifically, by the end of that day, as they were
4 talking to us, Dr. DeNoble and Dr. Melay, the people
5 doing the rat studies on nicotine, would be
6 terminated. They would -- the project would be shut
7 down. The rats would be destroyed, and no more of
8 that kind of research would be done.

9 In that room, the people who were
10 confronted with this information for the first time,
11 all of us were very concerned. There were other
12 projects going on that could be affected by this.
13 And Mr. Newman indicated that this defense, which he
14 termed the ostrich defense, would be used; that is
15 we don't want to have any things in our records that
16 talk about this being causation or addiction.

17 Q Excuse me, Ostrich as in bird?

18 A As in the bird that sticks its head in the
19 sand when confronted by a problem.

20 Q Okay.

21 A I raised the issue that some of us had
22 gone out to universities, had gone out to talk to
23 tobacco farmers, sales force, we had publicly
24 admitted that tobacco smoking caused disease,
25 because we talked about trying to hire scientists

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1 from the universities. We talked about what we were
2 doing to try to solve the problem. We were trying
3 to eliminate this chemical, that chemical. And the
4 literature was full of the knowledge that these
5 chemicals were in smoke and that these chemicals
6 caused the disease. So we had admitted it.

7 We had also admitted that cigarette
8 smoking was addictive. So what did this mean if we
9 were going to have a policy where you could no
10 longer say those things?

11 And we were told that we would not
12 any longer be allowed to say those things, that the
13 policy was going to be that you could not make those
14 admissions.

15 I asked also well, suppose
16 Dr. DeNoble and Dr. Melay went out and talked about
17 it?

18 A They said they are not going to do that
19 because "we'll sue them if they do. And you go back
20 and tell your employees that we'll sue anybody who
21 speaks out against the company with regard to
22 admitting that it causes addiction or admitting that
23 it causes disease."

24 So that was the conversation that I
25 went back and reported to my superior,

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1 Dr. Hausermann.

2 Now, if you recall before you -- we
3 took the break, that I had been told previously that
4 I would be promoted. Well, the next thing that
5 happens in the story is that my wife is told she is
6 not going to be promoted on the basis of her sex.
7 So my wife, figuring that was the whole arrangement
8 was to try to get female upward mobility, she filed
9 a complaint with the Equal Opportunity Employment
10 Commission.

11 The next thing that happens is that
12 I'm told that I am not going to be promoted. So I
13 asked the question, "Well, is that because of my
14 wife's complaint, or is it because you don't want my
15 services anymore? You know, I could just leave,
16 whatever." And my boss, Dr. Hausermann -- I'm
17 trying to shorten this story. There is a lot more
18 details. But basically, my boss, Dr. Hausermann,
19 said, "I can't really give you that advice, because
20 I'm in a difficult position. You need to consult an
21 attorney. Only an attorney can give you that
22 advice."

23 So the only attorney I knew was the
24 one that my wife had employed. So I consulted him.
25 Of course, he told me I should file a complaint --

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1 not a lawsuit -- file a complaint along with my
2 wife's and say that I was being terminated because
3 of my wife filing a complaint.

4 I said, "Well, okay. Prepare to file
5 a complaint, but don't file it, because I want to
6 talk to my boss about this." I had an excellent
7 relationship with Dr. Hausermann. I was supposedly
8 going to replace him. We were going to change the
9 way we were doing things.

10 So I went back, and Dr. Hausermann
11 was leaving on vacation. So I wrote him a note
12 saying, "I didn't think this was fair. Philip
13 Morris had made deals before, and I think the only
14 reason that I was being not promoted was because of
15 my wife's complaint." And I sent him that note. I
16 remember the date, June 26th, 1984.

17 He went on his vacation. A few days
18 later I was called into an office of the head person
19 for Employee Relations, whose name is Mr. Barry
20 Case. Mr. Case said that I would be terminated for
21 insubordination; the act of insubordination being
22 obtaining a lawyer.

23 I said, "Wait a minute. Max told me
24 to do this. There is a mistake." But the point of
25 the matter is that was Mr. Case's story. And I was

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1 to be escorted off the premises immediately by
2 Dr. Hausermann.

3 Dr. Hausermann was angry. So on the
4 way walking back, he said, "Well, you are not going
5 to be terminated for insubordination. As a matter
6 of fact, we're going to go back and tell the R&D
7 center, call them together, tell them you resigned.
8 We will work it out later. By the way, I'm not
9 going to escort you off the premises today. You
10 will spend the rest of the day as normal. You come
11 back tomorrow, get your stuff, and we'll tell them.

12 So I went along with that, because
13 even during this hard time, when my wife had filed a
14 complaint, I talked to my subordinates about the
15 fact that I might be leaving and things might
16 change, because that's the policy for doing that.

17 So we went back to the R&D Center.
18 The assembly was called. It was indicated that I
19 would be leaving. I agreed that I would be leaving.
20 I was sitting there while all this went on.

21 I went home. The next day I came
22 back, got my belongings, and I left. That was my
23 termination from Philip Morris.

24 Dr. Hausermann's idea of the
25 termination was that we work out a mutual

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1 arrangement, and I resign. Mr. Case's idea of the
2 arrangement was I was terminated for the
3 insubordination; the act of insubordination being
4 obtaining a lawyer, not for any performance-related
5 thing that I had done.

6 Q In reflection back upon those events, do
7 you think that it is possible that the things you
8 expressed to the lawyer, Mr. Newman, may have had
9 something to do with their choice to terminate you?

10 MR. PHILLIPS: Objection, speculation.

11 MR. WOBBROCK: Asking what's in his frame
12 of mind, Your Honor.

13 THE COURT: Okay. The Court will allow it
14 for state of mind exception. Proceed.

15 A Yes. I think when you argue with somebody
16 that's in a --

17 THE COURT: At the time, not now. Go
18 ahead.

19 A Yes.

20 BY MR. WOBBROCK:

21 Q Do you appear here as a witness out of
22 disgruntlement and anger at Philip Morris?

23 A No.

24 Q Why is it that you have chosen -- well,
25 before we do that, have you spoken out before being

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1 involved in any so-called litigation on issues of
2 smoking and health?

3 A Well, I was consulted by the Food and Drug
4 Administration at the end of 1993 -- actually,
5 beginning of '84, approximately ten years after
6 leaving Philip Morris. I was called to provide
7 expertise, consulting expertise, to the Food and
8 Drug Administration.

9 Q And was that your first involvement in a
10 forum that questioned issues relating to smoking and
11 health?

12 A From the time I left Philip Morris to the
13 time I was called by the Food and Drug
14 Administration; that's correct.

15 Q But that was not in formal trial court,
16 jury/Judge-type litigation?

17 A No, it wasn't. It was just as a
18 consultant to them. And I wrote a paper for them,
19 which was delivered to them in 1996. The first
20 potential litigation was the various Attorney
21 General suits.

22 Q And have you testified in that regard in
23 those kinds of cases?

24 A I have testified in many cases since that
25 time, since I had made my position known with regard

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1 to the Food and Drug Administration.

2 Q Why is it that you decided to speak out?

3 A I feel somewhat responsible. I was there
4 for a period of time. I was ineffective at changing
5 what was done. I reflect that since I left Philip
6 Morris, more people have died from smoking
7 cigarettes than died in the holocaust. And I just
8 feel I have a debt to repay to society to speak out
9 about these things so people understand the extreme
10 risk due to smoking.

11 Q We appreciate your testimony. Thank you,
12 Doctor.

13 THE COURT: All right. I think we are not
14 going to have time to get into any appreciable
15 amount of cross-examination tonight before
16 5:00. Members of the jury, let's stop right
17 now. Don't discuss the case with anyone.
18 Leave your notes in the jury room. Have a good
19 evening. You are hereby excused.

20 (Jury out.)

21 Counsel, when I said state of mind
22 exception, I think counsel said what is he
23 doing. I have reference to 803 sub 3.

24 MR. PHILLIPS: Can you read it to to me so
25 I don't have to read it?

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1 THE COURT: 803 sub 3: "The existing
2 mental, emotional, physical condition: A
3 statement of the declarant's then existing
4 state of mind, emotion, sensation or physical
5 condition, such as intent, plan, motive,
6 design, mental feeling, pain or bodily health,
7 but not including a statement of memory or
8 belief to prove the fact remembered or believed
9 unless it relates to the execution, revocation,
10 identification, or terms of the declarant's
11 will."

12 MR. WOBBROCK: Your Honor, would you have
13 us here at nine o'clock tomorrow.

14 THE COURT: Nine o'clock tomorrow.

15 You are excused, Doctor. Everybody have
16 a good evening, come back, live to fight again
17 another day.

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1 STATE OF OREGON)
) ss.
2 County of Multnomah)
3
4

5 I, Estelle T. Keating, Official Court
6 Reporter of the Circuit Court of the State of
7 Oregon, Eleventh Judicial District, certify that I
8 reported in stenotype the foregoing proceedings in
9 the above-entitled case.

10 I further certify that my stenotype
11 notes were reduced to transcript form by
12 Computer-Aided Transcription under my direction.

13 And I further certify that pages 1
14 through 71 contain a full, true, and accurate record
15 of my stenotype notes.

16 Dated this 19th day of February,
17 2001, at Portland, Oregon.
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Estelle T. Keating

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